

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO. 17 OF 2007

IN

APPEAL FROM ORDER NO. 218 OF 2006

District: PUNE

1) Smt. Sunita Laxmanrao Shinde)
Age 75 years, Occu.-Household)

2) Shivaji Laxmanrao Shinde, Age)
46 years, Occu.- Business,)

3) Chandrakant Laxmanrao Shinde)
Age 44 years, Occu.- Business)

4) Kumar Laxmanrao Shinde, Age -)
32 years, Occu.- Business,)

Appellant Nos. 1 to 4 all)
residing at 176, Kasba Peth,)
Pune 411 011.)

5) Mrs. Vidya Hemant Gunjal, Age)
42 years, Occu.- Household,)
Residing at Sun Paradise)
Phase I, Flat No. 608, S. No.6
Vadgaon Bk, Pune.)

6) Mrs. Sushma Ravindra Pophale,))
Age 40 years, Occu. Household)
Residing at B 2 62 Rail Vihar)
Bijlinagar, Chinchwad, Pune)

7) Mrs. Kishori Manoj Mehta, Age)
30 years, Occu.- Household,)
residing at 706 Raviwar Peth)
Talegaon Dabhade, Tal. Maval)
District Pune.)

Appellants

V/s.

- 1) Ashwini Cooperative Housing)
Society Ltd., a Society)
incorporated under the)
Maharashtra Cooperative)
Societies Act, bearing)
Registration No. PNA/Maval/HSG)
/622/1984 through its Chairman)
Shri Prakash Anant Valame, Age)
48 years, Occu.- Business,)
residing at 47/41, Erandavane)
Pune 411 038.)
- 2) M/s. Valame Enterprises,)
Through its Proprietress,)
Mrs. Ashwini Prakash Valame)
Adult, Occu.- Business,)
residing at 47/41/1 Erandavane)
Pune 411 038.)
- 3) M/s. V.K. Agharkar & Associates
Builders and Contractors,)
having their office at Arvis)
Chambers, 1st Floor, Plot No.1,)
Premlok Park, Chinchwad,)
Pune 411 033.)
- 4) Sanmati Builders,)
having their office at 1st)
floor, Arvis Chambers, Plot)
No.1, Premlok, Chinchwad,)
Pune 411 033.) Respondents

Mr. S.A. Bhagat with Mr. S.J. Chitale, Advocate for Appellants

Mr. Sanjay Kshirsagar, Advocate for the Respondent No. 1

CORAM : J.N. PATEL
AND
A. A. SAYED, JJ

RESERVED ON : 18TH APRIL, 2007.

PRONOUNCED ON : 11TH JUNE, 2007.

P.C. [A. A. SAYED, J]: -

1. The above Letters Patent Appeal is filed by the heirs of one Mr.Laxmanrao Shankarrao Shinde (hereinafter called "the said deceased-plaintiff") against the impugned order dated 21st November 2006 passed by the Single Judge of this Court, whereby the Appeal from Order No. 218 of 2006 was dismissed. The said Appeal from Order was filed against the order dated 3rd January 2006 passed by the 9TH Joint Civil Judge, Junior Division, Pune, dismissing the Misc. Application No. 655 of 2002 of the deceased Plaintiff i.e. the Original Applicant, for restoration of the suit by setting aside the order of dismissal of the suit.

2. The facts giving rise to the above Appeal are that the deceased had filed the Spl Civil Suit No. 514 of 1996 in Civil Court, Pune against the Respondents, praying interalia, for declaration, injunction, and other reliefs. On 16-08-2002, when the suit was kept for hearing, the said deceased i.e. the Plaintiff in the suit, could not remain present before the Trial Court and an application

came to be filed on behalf of the deceased Plaintiff for an adjournment on the ground of ill health of the deceased Plaintiff. The said application for adjournment came to be rejected and the suit was dismissed by the Trial Court.

3. The deceased-Plaintiff/original Applicant thereafter filed Misc. Application No. 655 of 2002 before Civil Court, Pune under Order 9 Rule 9 of Civil Procedure Code (CPC) seeking restoration of Special Civil Suit No. 514 of 1996 on 06-09-2002. Written Arguments dated 31st January 2004 were filed on behalf of the said deceased i.e. the Original Applicant. However after filing of the Written Arguments and during the pendency of the Misc. Application for restoration, on 18th November 2005, the deceased-Plaintiff died. Before expiry of 90 days from the date of the death of the deceased-Plaintiff, the impugned order dated 03/01/2006 came to be passed by the Civil Court Pune, whereby, as mentioned hereinabove, the Misc. Application for adjournment was rejected and the suit was dismissed and the Learned Single Judge of this Court vide order dated 21-11-2006 also

dismissed the Appeal against Order, which is impugned in the present Letters Patent Appeal.

4. We have heard the Ld. Counsel appearing on behalf of the Appellants and the Respondents No. 1. We have also gone through the rival pleadings including the order dated 3-01-06 of the Trial Court, Pune and the order dated 21-11-2006 of the Learned Single Judge of this Court in Appeal against order.

5. The short questions which arise in the above LPA are whether the deceased Plaintiff had shown sufficient cause in remaining absent before the Trial Court and whether Trial Court and the Appellate Court were right in refusing to restore the suit and dismissing the Misc. Application of the deceased Plaintiff and whether the Appellate Court was in error regarding the observations of abatement of the Application for restoration of suit.

6. The Learned Counsel for the Appellants who are the heirs of the deceased Plaintiff submitted

that sufficient cause for non appearance and adjournment was made out, as the deceased Plaintiff / original Applicant was unwell on that day and he had made a written application through his son for an adjournment. The Learned Counsel further submitted that the Trial Court as well as the Appellate Court did not appreciate the fact that the said deceased Plaintiff, who was the original Applicant was about 81 years of age at the time of making the application for adjournment of the suit and that he was keeping indifferent health. Alongwith the application for adjournment, a medical certificate of a Doctor was also produced. The medical certificate mentioned detailed ailments, like diabetes, blood pressure, arthritis, nocturnal emissions and the deceased Plaintiff was advised complete rest for eight days. The original Applicant therefore, could not move out of the house, as a result of which he could not attend the hearing of the suit personally, and accordingly the application for adjournment was made. The Learned Counsel for the Appellants further submitted that the Trial Court erred in rejecting the application for adjournment and dismissing the suit. He

submitted that there was no malafide or negligence or lack of bona fides on part of the deceased-Plaintiff / original Applicant in making this application for adjournment. He further submitted that the Appellants have a good case on merits and have a reasonable expectation of getting a fair Trial and success in the suit, and in the interest of justice and fair play they should be allowed to pursue the suit after restoring it to file and setting aside the orders of the Trial Court and the Appellate Court and that substantial justice be done in the matter instead of taking a pedantic view of the matter.

7. The Learned Counsel for the Appellants further submitted that the written arguments in the Misc. Application for restoration was filed on behalf of the deceased-Plaintiff / original Applicant on 31-1-2004. The deceased Plaintiff/original Applicant died on 18-11-2005 and the Trial Court passed the order dated 3-1-2006, dismissing the Misc. Application for restoration, before expiry of 90 days period from 18-11-2005 within which period, the Appellants (who are the heirs of

deceased Plaintiff / original Applicant) could make an Application for bringing themselves on record in the proceedings. The Learned Counsel for the Appellants therefore, submitted that the Learned Single Judge of this Hon. Court has wrongly held that since the heirs were not brought on record in the Misc. Application for restoration, the Misc. Application stood abated after the expiry of 90 days, and the restoration application itself was not maintainable.

8. On the other hand, the Learned Counsel for the Respondents No.1 submitted that the Trial Court and the Appellate Court have rightly dismissed the Application and the suit, since no sufficient cause was made out by the Appellants for restoration since the Trial Court had given an opportunity to the deceased Plaintiff of leading evidence in the suit and the deceased Plaintiff had avoided to proceed with the suit. Moreover, no Application for bringing heirs and legal representatives of the deceased Plaintiff was made and the suit and the Misc. Application stood abated.

9. In our view, the order of the Trial Court and the Single Judge of this Court are required to be set aside for the reasons hereinafter mentioned.

10. We find that the Trial Court and the Appellate Court did not appreciate the fact that, as held in catena of decisions rendered by the Apex Court as well as our Court in such matters, the Courts are required to take a pragmatic approach and not be hypertechnical as regards the procedural laws. The Trial Court and the Appellate Court lost sight of the fact that the said deceased, who was the Plaintiff in the suit, was about 81 years of age and that notwithstanding the fact whether any medical certificate was on record or not (for which there seems to be some debate), it was quite likely that the deceased Plaintiff may have been unwell looking to his old age and this fact could not be brushed aside. Moreover, it was not as if, no one remained present before the Court when the matter was called out. In fact on the day when the matter was called out, an application for adjournment was made on behalf of the deceased Plaintiff by his son. We also taken note of the fact that the

deceased Plaintiff was pursuing the suit and had even made an application for amendment to bring subsequent events on record and that the amendment was carried out to the plaint. Courts are no doubt burdened with huge arrears and the suits are required to be disposed of with desirable speed. However, there should not be any haste to dispose of matters at the cost of being just and fair, and to avoid any miscarriage of justice.

11. In M. K. Prasad Vs. Arumgum (2001) 6 SCC 176, it was held by the Hon'ble Supreme Court that the discretion under Section 5 of the Limitation Act 1963, has to be exercised to advance substantial justice.

12. In Collector, Land Acquisition, Anantnag Vs. Ms. Katiji (1987) 2 SCC 107, it was laid down by the Hon'ble Supreme Court that in determining "sufficient cause" under Section 5 of the Limitation Act, courts should adopt a liberal and justice-oriented approach.

13. In case of MUKESH C. HARVANI Vs. PUSHPABAI (2002) 2 Mh.L.J. 938, this Court has taken a view that in such cases hypertechnical view need not be taken and merely non-production of medical certificate should not lead to any inference so as to doubt the illness of the concerned person.

14. In Salem Advoate Bar Association Vs. Union of India, (2005) 6 SCC 344, it was held by the Hon'ble Supreme Court that under Order 17, Rule 1 (1) and (2) of the Civil Procedure Code, a right to adjournment, if any, and the maximum limit of three adjournments may be granted in case it can be shown that the circumstances are beyond the control of the party and that ultimately it would depend on the facts and circumstances of each case. It was further held that even in cases which may not strictly come within the category of circumstances beyond control of a party, Court by resorting to provisions of higher costs, including punitive costs in the discretion of the Court may grant adjournment beyond three, having regard to the injustice that may result in refusal thereof with reference to the particular facts of a case.

15. In the light of the principles laid down by the Apex Court and our Court, we find that in the present case sufficient cause was shown for the absence of the deceased Plaintiff before the Trial Court and the Court ought not to have dismissed the suit and the Misc. Application for restoration and at the highest costs could have been imposed and the suit ought to have been restored and heard on merits. The order of dismissal of the suit and the Misc. Application was rather harsh and the Trial Court and the Appellate Court ought to have taken a liberal construction to advance substantial justice, particularly when no malafide or lack of bona fide could be imputed to the deceased Plaintiff/original Applicant.

16. We further find that the Single Judge of this Court failed to appreciate that at the time when the Trial Court had passed the order i.e. 3-1-2006, the statutory period of 90 days from the date of death of the deceased Plaintiff/original Applicant, who died on 18-11-2005, had not been completed. Article 120 of the Limitation Act 1963

provides for a period of 90 days from the date of death of the Plaintiff, Appellant, Defendant or Respondent, as the case may be, to have the legal representative made a party. The Act also provides for a period of 60 days from the date of the abatement for an application for an order to set aside an abatement. The observations of the Learned Single Judge that "as the heirs were not brought on record, the restoration application stood abated after the expiry of statutory period of 90 days"€? would therefore, not be correct, since there were about 15 days left for the statutory period of 90 days to expire from 18-11-2005 when the deceased died and it was still open for the Appellant to bring themselves on record in the Misc. Application.

17. The Learned Counsel for the Appellant further submitted that the Appellate Court has overlooked the provisions contained in Order 22, Rule 6 of Civil Procedure Code (CPC). He relied upon the decisions reported in N. P. Thirugananam Vs. R. Jagan Mohan Rao AIR 1966 Supreme Court, 116, wherein it has been laid down that there can be no

abatement, by reason of the death of any party between the conclusion of the hearing, and the pronouncement of judgment. He therefore submitted that the Learned Single Judge, therefore, committed an error and the Miscellaneous Application deserves to be allowed by setting aside the order of the Trial Court and the Appellate Court.

18. We have examined Order 22, Rule 6 of CPC which reads as under-

“Rule-6 : No abatement by reason of death after hearing :€Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.”

19. The above provision is clear and we find that there could not have been abatement in the present case, since the written arguments

according to the Ld. Counsel for the Appellants was filed on 31-01-2004 and that there was no further hearing thereafter, and the deceased died on 18-11-2005 and the order passed by the Trial Court is dated 03-01-2006. If the contention of the Ld. Counsel of the Appellants is indeed true that there was no further hearing of the Misc. Application, then the provisions of Order 22 Rule 6 would squarely apply to the present case. We find merit in the contention of the Ld. Counsel for the Appellants and in our view, in the present case, there could not have been any abatement by reason of death of the deceased Plaintiff and the observations of the Appellate Court regarding the abatement are erroneous.

20. In the result, we allow the above Appeal and set aside the order dated 21-11-2006 passed by the Single Judge of this Hon'ble Court in Appeal from Order and the order dated 3-01-2006 passed by the Trial Court and restore the suit to file and we grant liberty to the present Appellants to make necessary Application for bringing themselves on record as plaintiffs in the suit. The

parties are put on notice to appear before the Trial Court within 6 weeks from the date of pronouncement of our judgment and order. There will however, be no order as to costs.

21. The Registrar (Judicial) to communicate our order to the Trial Court.

[A. A. SAYED, J.]

[J. N. PATEL, J.]

JUSTICE A.A.SAYED

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